STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY E. WAUN and DEANNA WAUN,

Plaintiffs-Appellants,

v

UNIVERSAL COIN LAUNDRY MACHINE, LLC, STEPHEN M. BEAN, and FREDERIC M. BEAN,

Defendants-Appellees.

UNPUBLISHED
September 26, 2006

No. 267954
Wayne Circuit Court
LC No. 04-424221-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court orders granting summary disposition in favor of defendants in this action concerning plaintiff Timothy Waun's failed business venture involving a coin-operated laundry. Waun[1] attended a seminar regarding coin-operated laundries that was conducted by defendants, who bill themselves as experts in the coin-operated laundry industry, and Waun eventually entered into an agreement with defendant Universal Coin Laundry Machine, LLC ("Universal"),[2] pursuant to which Universal would assist Waun in finding a demographically valid location to start a launderette and provide assistance in obtaining the necessary financing. Subsequently, a location was found and, based on cost and income projections developed by defendants, Waun decided to open a coin-operated laundry at the site. Waun purchased washers, dryers, and other launderette equipment from Universal after defendants assisted Waun in obtaining a business loan. The business failed as actual income fell well below that projected, and Waun and his wife, plaintiff Deanna Waun, who had signed as a guarantor on the business loan, filed this lawsuit against defendants, alleging breach of contract, breach of fiduciary duty, negligence, silent fraud, fraudulent misrepresentation, and negligent misrepresentation. The trial court granted summary disposition in favor of defendants on all counts by way of multiple orders. We affirm in part, reverse in part, and remand for further proceedings.

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[1] Reference to "Waun" in this opinion pertains to plaintiff Timothy Waun only.

[2] Defendants Stephen and Frederic Bean are the sole members and managers of Universal.

Plaintiffs first argue that the trial court erred in granting summary disposition in favor of defendants, where genuine issues of material fact existed regarding all of the alleged causes of action. We shall explore each count alleged in the complaint, engage in a discussion of the applicable law, conduct our analysis, and then render a holding on each cause of action. Initially, we observe our standard of review. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).[3]

With respect to the breach of contract claim, such a claim requires a plaintiff to establish all of the elements of a contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). The requisite elements of a valid contract are (1) parties competent to enter into a contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Plaintiffs' complaint alleged that defendants breached the "Coin and Debit Card Laundry Development Agreement" by failing to use their "best efforts," which is language found in the agreement, when they knowingly prepared grossly exaggerated income projections that were well beyond industry averages. In a related allegation, plaintiffs asserted a breach of contract for

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[3] Summary disposition was predicated on MCR 2.116(C)(8) and (10). MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

defendants' failure to disclose to the lender during the financing process that the projections were grossly exaggerated.[4]

On appeal, plaintiffs argue that issues of fact abound regarding whether defendants used their "best efforts" in locating a demographically valid location for the launderette and in assisting Waun in securing financing, which necessarily included the need to perform a cost and income analysis using "best efforts." Plaintiffs contend that defendants did not use their "best efforts" in preparing the income projections, where the 4.3 and 4.8 washer "turns per day," or TPD, used by defendants was unrealistically high and misleading, where defendants failed to disclose damaging income information regarding their actual experience with other coin-operated laundries, where defendants failed to disclose surveys conducted by the Coin Laundry Association (CLA), which indicated that the projections were unrealistic and exaggerated, where dryer income was projected at 56% of washer income when the industry average was 40%, where estimated vending machine income was more than double the industry average, and where the cost or expense analysis contemplated 16 hours of labor costs instead of 24 hours. Defendants maintain that the agreement simply did not require Universal to perform a cost and income analysis or to provide the information listed above; therefore, there could be no breach of contract.

We find that the agreement or contract is somewhat ambiguous relative to a cost and income analysis and the need to use "best efforts." If contractual language is ambiguous, the intent of the parties becomes a question for the trier of fact. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). The inquiry into the parties' intent relative to ambiguous language is not confined to the language of the contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d 447 (2003). Extrinsic evidence of the parties' conduct, the statements of representatives, and past practice can be used to aid in interpreting the contract. *Id.*

The contract here required Universal to utilize its "best efforts to locate a demographically valid location . . . in accordance with [Universal] criteria for the establishment of a coin or debit card laundry . . . ." The contract also mandated that Universal use its "best efforts to secure financing on [Waun's] behalf . . . ." We conclude as a matter of law that this language required Universal to engage in a cost and income analysis, including the preparation of income projections, and to do so using "best efforts," when considering other language in the contract and Stephen Bean's deposition testimony. Standing alone, paragraphs one and two of the contract do not expressly provide that Universal was obligated to perform a cost and income analysis; however, the need to locate a demographically valid location and to assist in securing financing would suggest the necessity of such an undertaking. Supporting this proposition, paragraph six of the contract, which addresses a possible scenario in which Waun discontinued the project despite Universal's satisfaction of its obligations, provides for an hourly charge, made

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[4] Plaintiffs also claimed that the agreement was breached when defendants failed to disclose that the site for Waun's launderette was less than three miles from another laundry developed by Universal. Plaintiffs made this same allegation in the context of other alleged causes of action. This particular claim, however, was dismissed by stipulation and is not pursued on appeal.

retroactive, to cover time spent by Universal "for demographic studies, real estate activities, *pro-forma development* and financing activities." (Emphasis added.) This language expressly indicates that part of Universal's duties included pro-forma development or performing a cost and income analysis. Moreover, paragraph one of the contract references reliance on Universal "criteria" in selecting a demographically valid location, but the contract does not clearly identify the criteria; however, the subsequent reference to pro-forma development suggests that a cost and income analysis constitutes part of the criteria considered by Universal. Additionally, at the bottom of the contract and separate from the body of the contractual language, there is a general and vague reference to "Feasibility Studies." We conclude that the contract is ambiguous with respect to the need to perform a cost and income analysis using "best efforts," but resolution of the issue by the trier of fact is unnecessary because, in the context of summary disposition, Stephen Bean's testimony revealed the lack of a genuine issue of material fact regarding how the ambiguity should be resolved. Clearly, if the documentary evidence presented at summary disposition leaves no genuine issue of fact with regard to interpretation of an ambiguous contract, the issue can be decided by the court as a matter of law. Bean testified as follows:

> *Q*. Well, let's take a look [at] Exhibit Number 4. What's the title of that document, sir?
>
> *A*. Coin and Debit Card Laundry Development Agreement.
>
> *Q*. That indicates that you're to use you best efforts at Universal to try to develop a site – to find a site for somebody?
>
> *A*. Correct.
>
> *Q*. That includes demographic analysis *and the kind of income analysis you've done here*?
>
> *A*. *Correct.* [Emphasis added.]

We also note that a cost and income analysis was actually performed, and we see no reason why this would have been done unless Universal was obligated to do so under the contract. Accordingly, we hold as a matter of law that the contract required Universal to engage in a cost and income analysis, including the preparation of income projections, and to do so using "best efforts." Furthermore, a genuine issue of material fact exists concerning whether Universal used its "best efforts" in doing the analysis and in making the income projections; therefore, the breach of contract action was improperly dismissed. Reasonable minds could differ regarding the issue of "best efforts," and because the contract required "best efforts" to be utilized, the trier of fact must determine whether the contract was breached in this regard.[5]

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[5] There is a lack of Michigan law examining contractual "best efforts" language. We believe that the language should simply be considered by the trier of fact in accordance with its plain and ordinary meaning without the need for elaboration.

(continued…)

We do wish to make clear that the simple fact that the income projections were not met, in and of itself, does not mean that "best efforts" were not used.[6] But considering the CLA survey, the evidence regarding income produced at other laundries from washers, dryers, and vending machines, Bean's reliance on national averages from a magazine without context and, apparently, without consideration of various factors such as demographics, the affidavit from plaintiffs' expert, Bean's inability to explain the high vending machine projections, and the failure to project costs based on 24-hour operation, we conclude that a reasonable juror could find that Universal had not utilized its "best efforts" in performing the cost and income analysis.[7] The trial court's ruling dismissing the breach of contract action is reversed.

With regard to the claim of fraudulent misrepresentation, plaintiffs alleged in the complaint that, as part of the site analysis, defendants represented that a reasonable monthly income exceeded $29,000. According to plaintiffs, this representation was false, defendants knew that it was false when made, defendants made the misrepresentation with the intent to induce reliance on plaintiffs' part, plaintiffs acted in reliance on defendants' misrepresentation, and plaintiffs were damaged when they justifiably relied on the misrepresentation.

A plaintiff claiming actual fraud, or fraudulent misrepresentation, must establish the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew the representation was false when it was made, or made it recklessly without any knowledge of its truth, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered injury due to his reliance on the representation. *Hord v Environmental Research Institute of Michigan* (*After Remand*), 463 Mich 399, 404; 617 NW2d 543 (2000); *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). This Court has also held that, to recover in an action for misrepresentation, a party's reliance on the false statements must be reasonable. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

Misrepresentations must relate to past or existing facts, and "[a] promise regarding the future cannot form the basis of a misrepresentation claim." *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998). In general, an action for fraud cannot be based on the failure of future events to transpire as represented or predicted. See *Foreman v Foreman*, 266 Mich App 132,

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(…continued)

[6] In that same vein, even if projections were met, one could not necessarily conclude that "best efforts" were used.

[7] We point out a few matters worthy of discussion. First, unlike the generic pro-formas distributed at the seminar, the specific pro-formas provided to Waun did not disclaim that the analyses were not to be considered guarantees of income. Next, although Bean downplayed the CLA survey because it did not consider various distinguishing factors, it can also be said that his reliance on the national averages reflected a failure to consider various factors. Also, our ruling does not hinge on the affidavit of plaintiffs' expert, which affidavit is arguably inconsistent with MRE 702 and the rule that expert testimony must be based on sufficient facts or data.

143; 701 NW2d 167 (2005); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993). "An action for fraud may not be predicated upon the expression of an opinion or salesmen's talk in promoting a sale, referred to as puffing." *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). On appeal, defendants rely on these propositions in arguing that the trial court's ruling should be affirmed.

Early Michigan Supreme Court precedent addressed issues concerning representations of future profits and income. The Court has indicated that unmet estimates or projections regarding anticipated income cannot constitute fraud. See *Simpson v Murphy*, 229 Mich 449, 451-452; 201 NW 464 (1924).[8] A statement regarding the amount of business a party could do in the future is generally not actionable as it relates to future facts, thereby constituting an opinion, and not past or present facts. *Burch v Stringham*, 210 Mich 48, 52; 177 NW 147 (1920). In *Kulesza v Wyhowski*, 213 Mich 189, 192-193; 182 NW 53 (1921), the Court noted, "The representations as to the profit . . ., if made as claimed, were but an expression of the visionary hopes of men without knowledge or experience on which to found them, and form no sufficient basis for recovery." In *Bourke v Checker Cab Mfg Corp*, 239 Mich 229; 214 NW 82 (1927), the plaintiff contended that the defendants fraudulently induced him to purchase taxicabs and to go into the taxicab business in Kalamazoo. The plaintiff closed the business after the taxis were taken from him as the result of a delinquency in payment. The Court, after observing that competition is generally a hazard of doing business, stated:

> It is urged that it was represented to plaintiff that Kalamazoo offered an opportunity to do a profitable business. At most, that was a mere expression of an opinion actually entertained. And, in any event, we think it was not a misrepresentation. [*Id.* at 233-234.]

The Court, however, has recognized that there are occasions on which representations regarding projected income or profits may form the basis of a fraud claim as when the projections are predicated on underlying deceit concerning past or existing facts. *Mesh v Citrin*, 299 Mich 527, 534; 300 NW 870 (1941). The *Mesh* Court, addressing a situation in which the plaintiff, inexperienced in the gas station business, subleased a gas station and equipment from the defendants, stated:

> Plaintiff and his mother-in-law both testified Biber [the defendants' agent] stated that plaintiff would make $50 a week operating the station. Biber denies making such statement. Defendants contend that such alleged representation, if made, was prospective in nature – not an assertion of an existing fact – and, therefore, establishes no basis for rescission or claim for damages. Biber's statement, *standing alone*, would undoubtedly be a matter of opinion only. However, from the record it appears that such statement formed a part of, and was

[8] "[T]o constitute actionable fraud, the past or existing facts may not consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events." 10 Michigan Civil Jurisprudence, Fraud and Undue Influence, § 31, pp 407-408.

connected with, the alleged representation as to the volume of gasoline sales. [*Id.* (emphasis added).]

The Court concluded that the questions of fraud and misrepresentation were properly submitted to the jury. *Id.* at 537.[9]

Here, the representation that Waun would make approximately $29,000 per month in income based on projected or estimated TPD (washing machine income), and dryer and vending machine income, standing alone, certainly constitutes an opinion regarding future events and would generally not be actionable. The problem is that the income projection in this case cannot be viewed in isolation as it was allegedly arrived at through examination and analysis of past and existing income information relative to the coin-laundry industry. This is not a situation in which defendants were merely accused of puffing and making unsupported vague and generalized statements that the business venture would be profitable or successful. Rather, defendants were paid to undertake a specific analysis involving reflection on actual demographics and industry income from washer, dryer, and vending machine use, and, if there was indeed intentional deception at play as part of this undertaking and in arriving at the $29,000 projection, a fraud claim may be maintained. In other words, if there were misrepresentations and deceit relative to past and existing financial income information regarding the coin-operated laundry industry, in the context of similar launderettes or through pro-rata analysis, which underlying information formed the basis for the ultimate projection, defendants' representation as to projected income would be actionable and recovery allowed if all of the necessary elements of the claim are established.

In a case involving alleged oral misrepresentations regarding securities, the United States District Court for the Western District of Michigan has stated that "projections and financial forecasts made on a reasonable basis are not actionable merely because they may ultimately prove incorrect." *Platsis v E F Hutton & Co, Inc*, 642 F Supp 1277, 1293 (WD Mich, 1986), aff'd 829 F2d 13 (CA 6, 1987). We note the use of the language "reasonable basis." Of course, in the context of a fraud action, fraudulent intent and the other necessary elements must be proven. But plaintiffs have also alleged negligent misrepresentation. With respect to the claim of negligent misrepresentation, plaintiffs essentially made the same allegations in the complaint as those made in the context of the fraudulent misrepresentation count, except that the claim

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[9] We also note *People's Furniture & Appliance Co v Healy*, 365 Mich 522, 525; 113 NW2d 802 (1962), in which our Supreme Court expressed the following:

> Defendant, an experienced real-estate man and a civil engineer, volunteered his statement. He did so apparently in an effort to persuade plaintiff to buy the property. Under the circumstances, plaintiff had a right to rely on the same. Where one knows that the other party is guided by his statements, an action for fraud will lie, even though the representation or statement is with regard to future or contingent events. 23 Am Jur, Fraud and Deceit, § 37, p 798.

regarding exaggerated income projections was couched in terms of defendants' actions being negligent as opposed to fraudulent.

In order to establish negligent misrepresentation, a plaintiff must show that he or she justifiably and detrimentally relied on information provided without reasonable care by one who owed the plaintiff a duty of care. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989).

Here, we conclude that genuine issues of fact exist regarding whether defendants engaged in fraud, by way of fraudulent misrepresentations, or made negligent misrepresentations. Our focus, as indicated above, is on the income actually being generated in the industry by comparable launderettes, or through pro-rata analysis, and whether defendants misrepresented that information in the formulation of the income projection. We fully understand and appreciate that this is not an exact science and that there is going to be varying information and interpretation to some degree, but there is sufficient documentary evidence to suggest that defendants' projection and the numbers utilized by defendants were not even close to being consistent (thus false) with the actual income information attributable to the coin-operated laundry industry. Again, considering the CLA survey, the evidence regarding income produced at other laundries from washers, dryers, and vending machines, Bean's reliance on national averages from a magazine without context and, apparently, without consideration of various factors such as demographics, the affidavit from plaintiffs' expert, and Bean's inability to explain the high vending machine projections, we conclude that a reasonable juror could find that defendants fraudulently and/or negligently made misrepresentations.

Defendants maintain that plaintiffs' reliance on provided information was unreasonable. On the issue of reasonable reliance, this Court has stated that "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474-475; 491 NW2d 851 (1992). But our Supreme Court, citing numerous earlier opinions, has also ruled, "The fact that plaintiff might have ascertained the situation from others is no defense if plaintiff had a right to rely on defendant's representations." *People's Furniture & Appliance Co v Healy*, 365 Mich 522, 526; 113 NW2d 802 (1962)(citations omitted).

Here, we conclude that the trier of fact must determine whether the alleged misrepresentation was reasonably relied on by plaintiffs. Waun does have a business background, defendants were, ultimately, selling merchandise to Waun, which should have raised his guard, and defendants did not actively prevent him from accessing information regarding the industry and other operators. In fact, defendants directed him to speak with other operators, although those suggested were happy and content with their businesses; defendants did not mention dissatisfied operators. On the other hand, Waun had no experience with coin-operated laundries, defendants sold themselves as experts in the field upon whom others could rely, the transaction, while having a sales aspect to it, also involved a close working relationship with the common goal of starting a launderette, and, finally, possible discussions between Waun and other operators regarding financial information, assuming such information would even be forthcoming, would only represent a minute number of operators in the country, as compared to the vast body of information supposedly accumulated by defendants over the years in conducting their business. Clearly, any analysis of vast industry information regarding TPD and income,

along with consideration of demographics, was more suited for defendants than Waun. The issue of reliance and whether Waun's reliance on defendants' income representation was reasonable are within the purview of the trier of fact under the circumstances of this case and considering the nature of the relationship. Reasonable minds could differ regarding whether Waun had a right to rely on defendants' representation and whether the reliance was reasonable.[10]

With respect to the claim of silent fraud, plaintiffs alleged in the complaint that defendants had a legal duty to disclose all material facts when performing the site analysis, which would eventually lead to defendants selling hundreds of thousands of dollars in equipment to Waun. Defendants allegedly violated this duty by not disclosing that average industry sales were significantly lower than the sales projections developed by defendants. Plaintiffs asserted that the nondisclosure was knowingly misleading, giving plaintiffs a false impression of the economic viability of operating a launderette at the locale selected, which false impression was justifiably relied upon by plaintiffs in deciding to go forward with the deal.

It has been established under Michigan law that silence cannot constitute actionable fraud absent it occurring under circumstances in which there were a legal duty of disclosure. *M & D, supra* at 29. Silent fraud is predicated on statements made in response to specific inquiries, which statements are incomplete or misleading. *Id.* at 31. "Supreme Court precedent clearly indicates that, in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure. *Id.* Here, the very nature of the relationship, the parties' interaction, and the contract established an inquiry by Waun into how much money could be made in operating a laundry and industry income levels, and because of the relationship and contract, a legal and equitable duty of disclosure arose in our opinion. Defendants' response to Waun's inquiries, by way of the cost and income analysis, was allegedly incomplete and misleading, and there is documentary evidence to support that proposition as reflected in our discussion above. The trial court erred in dismissing the silent fraud claim.

With respect to the negligence claim, plaintiffs alleged that defendants had a duty to perform a site analysis with reasonable care and that they breached said duty by developing the site analysis with grossly exaggerated income projections. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) duty; (2) a breach of that duty; (3) injury or damages; and (4) causation. *Henry v The Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). The threshold question in any negligence action is whether the defendant owed a duty to the plaintiff. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). Without the existence of a duty, there can be no tort liability. *Id.* Quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967), the Supreme Court in *Fultz* stated:

> "[W]hile [a] duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual

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[10] Defendants also argue that Waun did not fully utilize their services and failed to use their suggested marketing strategies, and that this is why the income projection was not met. Again, this argument regards a factual inquiry that needs to be developed and addressed at trial.

> relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, *and that a negligent performance constitutes a tort as well as a breach of contract*." [*Fultz, supra* at 465 (emphasis added).]

The Court proceeded with its analysis, stating:

> This Court and the Court of Appeals have defined a tort action stemming from misfeasance of a contractual obligation as the "violation of a legal duty separate and distinct from the contractual obligation."
>
> We believe that the "separate and distinct" definition of misfeasance offers better guidance in determining whether a negligence action based on a contract and brought by a third party to that contract may lie because it focuses on the threshold question of duty in a negligence claim. As there can be no breach of a nonexistent duty, the former misfeasance/nonfeasance inquiry in a negligence case is defective because it improperly focuses on whether a duty was breached instead of whether a duty exists at all.
>
> Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id.* at 467 (citations omitted).]

Here, Waun was not a third party to the contract, and, clearly, a duty independent of the contract arose when defendants affirmatively commenced and completed the preparation of the cost and income analysis. Negligent performance of the contract, or misfeasance, can constitute a tort as well as a breach of contract. Documentary evidence sufficient to survive summary disposition, as cited above, was presented indicating that defendants failed to use ordinary care and were negligent in performing the analysis. The trial court erred in dismissing the negligence claim.

With regard to the claim of breach of fiduciary duty, plaintiffs alleged that a fiduciary relationship arose where defendants represented themselves as experts in the field of coin-operated laundries, and where defendants knew that Waun was relying on this expertise in deciding to engage in the business venture. Plaintiffs asserted that defendants breached their fiduciary responsibilities of honesty, good faith, and fair dealing relative to grossly exaggerated income projections that were used to justify the site selection and entice Waun to start the business and purchase equipment from Universal. Plaintiffs make these same arguments on appeal, while defendants contend that the law does not recognize a fiduciary relationship under the facts presented here. We agree with defendants.

A fiduciary relationship arises from the reposing of faith, confidence, and trust, along with the reliance of one upon the judgment and advice of another. *First Public Corp v Parfet*, 246 Mich App 182, 191; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101; 658 NW2d 477 (2003). A fiduciary is under a duty to act for the benefit of the other person

concerning matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). A plaintiff is entitled to relief when a fiduciary relationship arises and the fiduciary's influence has been acquired and abused, or when confidence has been reposed and betrayed. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). A fiduciary owes a duty to his principal to act in good faith and is not permitted to act for himself at the principal's expense. *Central Cartage Co v Fewless*, 232 Mich App 517, 524-525; 591 NW2d 422 (1998). A fiduciary relationship can be founded, in general, on intimate personal or business relations in which trust or confidence is accepted. *Boden v Renihan*, 299 Mich 226, 239; 300 NW 53 (1941). However, it is unreasonable for a person to repose trust and confidence in another individual where the interests of each are adverse. See *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997). For example, a fiduciary duty does not generally arise in the context of a lender-borrower relationship. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). Mere allegations of inexperience and reliance are insufficient to establish a fiduciary relationship. *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991). Whether to recognize a plaintiff's cause of action for breach of fiduciary duty is a question of law that we review de novo. *Teadt, supra* at 574.

We conclude that the parties did not have a fiduciary relationship; therefore, the trial court did not err in dismissing the breach of fiduciary duty claim. While there existed some commonality of interests in starting the coin-operated laundry, ultimately defendants were seeking to sell hundreds of thousands of dollars in laundry equipment to Waun, and thus we cannot state that they had continuing mutual interests. This was merely a contractual business transaction not rising to the level of creating a fiduciary relationship. Waun's claims of inexperience and reliance on defendants' expertise, a common situation in today's business environment, are not sufficient to create a fiduciary relationship. If such a relationship were recognized here, our opinion could be read as supporting the conversion of a vast number of ordinary business arrangements into relationships demanding higher judicial scrutiny, and we are not prepared to make such a ruling. The trial court's dismissal of the count is affirmed.

Plaintiffs next argue that the trial court erred in dismissing the action with respect to Mrs. Waun. The court ruled that she could not recover because the law did not recognize her as a third-party beneficiary to the contracts between her husband and Universal. As to the breach of fiduciary duty claim, the claim was properly dismissed relative to Mrs. Waun because, as in Mr. Waun's case, no fiduciary relationship existed. With respect to the surviving claims, we hold that Mrs. Waun's suit was properly dismissed in regard to the breach of contract action as she was not an intended third-party beneficiary of the contract. The trial court erred, however, in dismissing her tort claims (fraudulent and negligent misrepresentation, silent fraud, and negligence), where third-party beneficiary status to the contract was irrelevant, the alleged torts could be viewed as being committed prior to and at the time of financing when provided to the loan officer, and where she had standing to litigate the alleged torts considering that she guaranteed the loan as part of the financing, which loan was given on the basis, in part, of defendants' alleged fraudulent and negligent income projection. See 17 Michigan Law &

Practice, Fraud, § 10, p 395 ("For there to be an action for fraud, the plaintiff must be the one who was injured from the fraud, and the defendant must have induced the plaintiff's act.").[11]

Plaintiffs frame this issue within the context of the law regarding third-party beneficiaries, as do defendants. Only intended, and not incidental, third-party beneficiaries may sue for breach of a contractual promise in their favor. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003); *Koenig v City of South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999). A person is an intended third-party beneficiary to a contract only if the promisor has undertaken a promise directly to or for the third party. MCL 600.1405(1); *Schmalfeldt, supra* at 428. The agreements executed by Waun and Universal do not reflect that Mrs. Waun was an intended third-party beneficiary; any benefits flowing to Mrs. Waun from the agreements were merely incidental. No promises were made directly to or for Mrs. Waun. Accordingly, plaintiffs' arguments pursuant to third-party beneficiary law fail with respect to the contractual claim. The trial court did not err in dismissing Mrs. Waun's breach of contract claim.

We find, however, that this issue, as it relates to the tort claims, essentially concerns standing as opposed to contractual third-party beneficiary status which is irrelevant; the question being whether Mrs. Waun, as guarantor of the business note, had an interest sufficient to allow her to pursue the surviving tort causes of action alleged in the complaint. In *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 736-740; 629 NW2d 900 (2001), our Supreme Court, after examining the constitutional underpinnings of Michigan's standing doctrine, adopted the test for standing stated in *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). To meet this test, a plaintiff must demonstrate three things:

> "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." [*Lee, supra* at 739, quoting *Lujan, supra* at 560-561 (internal quotes deleted; omissions in original; alterations in original).]

Mrs. Waun was involved in the financing as a guarantor, and the tortious conduct complained of by plaintiffs related to not only Mr. Waun's decision to pursue the business venture, but to the securing of a business loan and Mrs. Waun's decision to guarantee the loan. Therefore, the alleged fraud was not only directed at Mr. Waun but at Mrs. Waun and the bank.

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[11] "One who, by fraudulent representation, induces another to act to his or her damage is liable for the damages suffered, and it is not essential that there should have been privity of contract or other personal dealings." 17 Michigan Law & Practice, Fraud, § 10, p 396, citing *Karibian v Paletta*, 122 Mich App 353; 332 NW2d 484 (1983); *Oppenhuizen v Wennersten*, 2 Mich App 288; 139 NW2d 765 (1966).

As such, if the torts are established, and considering the failure of the business for which Mrs. Waun would be legally responsible as to the note, she suffered an invasion of a legally protected interest that was concrete, particularized, and actual or imminent, not conjectural. And there is a causal connection between the injury and the complained of conduct. If defendants committed fraud and negligence and the business had no reasonable prospect for profitability if the truth be told, it is doubtful Mrs. Waun would have guaranteed the loan, assuming that a loan would have even been offered under those circumstances. Finally, any tortious conduct and injury can be redressed by a favorable court ruling. Accordingly, the trial court erred in dismissing the surviving tort claims brought by Mrs. Waun.

Plaintiffs finally argue that the trial court erred in dismissing the Beans, in their individual capacities, where Michigan law recognizes that officers, employees, and agents of corporate entities can be held personally liable for their torts notwithstanding any lack of personal profit. It is not necessary to address this issue in relation to the cause of action for breach of fiduciary duty and the breach of contract claim relative to Mrs. Waun that were properly dismissed as discussed above. Within the context of the surviving claims, we conclude that the Beans are shielded from liability on the contract action brought by Mr. Waun, but not with respect to the remaining tort claims of fraudulent and negligent misrepresentation, silent fraud, and negligence.

Under Michigan's Limited Liability Company Act, MCL 450.4101 *et seq.*, a "limited liability company" is defined as "an entity that is an unincorporated membership organization formed under this act." MCL 450.4102(2)(k). MCL 450.4501(3), which addresses the liability of limited liability company members and managers, provides:

> Unless otherwise provided by law or in an operating agreement, a person who is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company.

The breach of contract claim related to a contract between Universal and Waun. This was a contractual obligation of the LLC, and plaintiffs cite no relevant authority that would extend this contractual liability to the Beans individually.[12] Therefore, pursuant to MCL 450.4501(3), the trial court properly dismissed the contract action against Stephen and Frederic Bean. We now turn to the remaining tort claims. Although performed by Stephen Bean, the preparation of the cost and income analysis was an "act" of the LLC, Universal, pursuant to the contract. MCL 450.4501(3) would appear to preclude individual liability being imposed on the Beans unless personal liability was otherwise provided by law.

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[12] We find no basis to pierce the limited liability company veil, which concept has been used to pierce the corporate veil in corporation cases in order to protect corporate creditors "where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations." *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996)(citation omitted). There is no evidence that the Beans were misusing the company's structure or that the company was not economically justified. See *Rymal v Baergen*, 262 Mich App 274, 294; 686 NW2d 241 (2004).

In the context of general corporate law, this Court in *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005), stated:

> [I]t appears that the trial court accepted, without indicating any authority for its conclusion, the argument that an agent cannot be liable for his tortious conduct if that conduct was done in the capacity as an agent of the corporation. But as this Court observed in *Warren Tool Co v Stephenson*, [11 Mich App 274, 300; 161 NW2d 133 (1968),]an agent may be held liable for those torts in which the agent participated.
>
> "It is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort. *Zaino v. North Woodward Construction Company* [355 Mich 425, 429; 95 NW2d 33 (1959)] (fraudulent representations); *Allen v. Morris Building Company* [360 Mich 214, 218; 103 NW2d 491 (1960)] (willful change in natural flowage of water); *Wines v. Crosby & Co.* [169 Mich 210, 214; 135 NW 96 (1912)] (active promotion and sale of a compound known to be dangerous); *Bush v. Hayes* [286 Mich 546, 549; 282 NW 239 (1938)] (conversion); *Hempfling v. Burr* [59 Mich 294, 295; 26 NW 496 (1886)] (fraud). [*Id.*]"

We conclude that this well-accepted principle of law regarding individual tort liability and business entities should apply in relationship to the "unless otherwise provided by law" exception of MCL 450.4501(3). Therefore, the remaining tort claims may be pursued against the Beans individually.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy